

Appeal No. UKEAT/0016/20/VP
UKEAT/0085/20/VP

EMPLOYMENT APPEAL TRIBUNAL
ROLLS BUILDING, 7 ROLL BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 26-27 May 2021
Judgment handed down 6 July 2021

Before
THE HONOURABLE MRS JUSTICE EADY DBE
(SITTING ALONE)

SECRETARY OF STATE FOR JUSTICE

APPELLANT

MR BEN PLAISTOW

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

TOPIC NUMBERS: 31; 32; 11;

Sexual orientation discrimination – victimisation – unfair dismissal - compensation

TOPIC NUMBER: 8

Practice and procedure – costs

Having upheld the Claimant’s claims of direct sexual orientation discrimination, of harassment related to sexual orientation, of victimisation and of unfair dismissal, the Employment Tribunal (“ET”) went on to assess compensation on a career-loss basis, calculated using a base salary that adopted an average of the competing pay figures used by the parties, and to award a 20% uplift for the Respondent’s failure to comply with the **Acas Code on Discipline and Grievance** (“the Code”) pursuant to section 207A **Trade Union and Labour Relations (Consolidation) Act 1992** (“TULRCA”). Separately, the ET ordered the Respondent to pay one-third of the Claimant’s total costs, notwithstanding an earlier costs award in respect of the Respondent’s unreasonable conduct which the ET had assessed as having given rise to four days of additional costs.

The Respondent appealed against the ET’s Remedy Judgment on the basis that it had been wrong/had reached a perverse decision in awarding compensation on a career-loss basis and had failed to apply a correct discount (Grounds 1 and 2); that it had erred in its approach/reached a perverse decision in its calculation of base salary (Grounds 3 and 4); and that it had failed to carry out the requisite assessment of the uplift awarded under section 207A **TULRCA** (Ground 5). It further appealed against the ET’s Costs Judgment as offending against the principles of *res judicata* given the earlier costs award it had made.

Held: upholding the appeals in part

Remedy Appeal

As a result of the discriminatory treatment he had suffered, it was common ground that the Claimant suffered moderate PTSD, depression and symptoms of paranoia, presenting with various functional impairments as a result (which included finding it difficult to leave his house on some days, or to attend to his personal care, or interact with members of the public, as well as experiencing low mood and sleep disturbance). On the basis of the Claimant's expert medical evidence, the ET had permissibly found that the Claimant's condition was likely to be life-long. Adopting the approach laid down in Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290, the ET concluded that it was very unlikely that the Claimant would ever be able to return to any work; on the basis of the ET's findings, it was entitled to find that this was one of those rare cases where it would be appropriate to consider the Claimant's future losses on a career-long basis. Equally, given its findings of fact, the ET had been entitled to apply only a 5% discount when assessing the likelihood of the Claimant choosing to leave his employment early or the possibility of his being able to return to some form of employment in the future. It had, however, erred in failing to take account of the more general uncertainties of life that might impact upon either the length of a person's working life or even just the length of their working day and Grounds 1 and 2 of the appeal would be upheld on that basis.

As for the calculation of base salary, the parties had each relied on different years as representative of the Claimant's earnings, taking into account overtime. The ET had permissibly calculated base salary on the average of the two years used by the parties; that broad-brush approach neither demonstrated an error of law nor gave rise to a perverse conclusion. Grounds 3 and 4 were dismissed.

In determining that an uplift of 20% should be awarded in respect of the Respondent's failure to comply with **the Code**, the ET had not demonstrated that it had considered the absolute value of the award it was thus making; that was an error of law (Acetrip Ltd v Dogra, unreported, EAT

(18 March 2019), UKEAT/0238/18, and **Banerjee v Royal Bank of Canada** [2021] ICR 359, EAT, followed). The ET's reasoning needed to demonstrate that it had considered the totality of the award and that this was proportionate to the Respondent's breach of **the Code** and to any harm suffered by the Claimant as a result (such that it was just and equitable to make an award of an uplift in that sum). Ground 5 of the appeal would therefore be allowed.

The Costs Appeal

At a relatively early stage of the liability hearing, the Claimant had made an application to strike out the Respondent's response given its unreasonable conduct, in particular in relation to issues of disclosure; the Claimant reserved the right to apply for costs until the end of the hearing. The ET declined to strike out the response but determined that the Respondent's conduct in relation to disclosure and witness availability had been unreasonable and that it was appropriate to make a costs order in this regard. The ET assessed that conduct as extending the hearing by four days and duly made an award in favour of the Claimant for the costs of those additional days.

After the promulgation of the ET's Liability Judgment, the Claimant had made an application for the entire costs of the proceedings. The ET had granted this application but limited recovery to one-third of his costs. In so doing, the ET had again referred to the Respondent's unreasonable conduct in relation to disclosure. To the extent that related to such conduct post-dating the first costs award, no objection could be taken. The ET's reasoning suggested, however, that it also related to disclosure issues prior to its making the first costs award, thus re-opening an issue that had already been determined and exposing the Respondent to double jeopardy in respect of that conduct. On that basis, the Respondent's appeal would be allowed. It was, however, not possible to simply limit the second costs order to one-third of the Claimant's costs post-dating the first award; that would not take account of the other aspects of the Respondent's unreasonable conduct that pre-dated the first costs order but had formed no part of the ET's reasoning at that time, and

might fail to properly represent the ET's intentions, given that it had limited costs to one-third by adopting a broad-brush approach to this issue. Absent any agreement between the parties, the issue of costs would need to be remitted to the ET.

A THE HONOURABLE MRS JUSTICE EADY:

Introduction

B 1. This Judgment relates to two appeals. The first arises from a decision on remedy and raises questions as to the approach to the assessment of compensation; specifically, as to the assessment of the period for which loss should be evaluated, as to the proper determination of base salary when claimed as including overtime, and as to the correct approach to the award of a percentage uplift pursuant to section 207A **Trade Union and Labour Relations (Consolidation) Act 1992** (“TULRCA”). The second appeal relates to a costs award and asks whether the principle of *res judicata* applied in respect of a second award made in this case.

D 2. In giving this Judgment, I refer to the parties as the Claimant and the Respondent, as below. My Judgment was reserved following a full hearing relating to the Respondent’s two appeals; the first against the Judgment of the Employment Tribunal sitting in Cambridge (Employment Judge Ord, sitting with Lay Members Mrs Prettyman and Mr Smith, over five days in May 2019; “the ET”), sent out to the parties on 12 June 2019, and concerning the question of remedy (“the Remedy Judgment”); the second against the ET’s separate Judgment on costs, sent out on the same day (“the Costs Judgment”). The ET’s earlier decision on liability, reached after a lengthy hearing over some 27 days in 2018, had upheld the Claimant’s claims of direct sexual orientation discrimination, of harassment related to sexual orientation, of victimisation and of unfair dismissal; that Judgment (“the Liability Judgment”) was sent to the parties on 5 February 2019. There has been no appeal against any of the ET’s findings on liability.

H 3. Ms Braganza, who appears for the Claimant on these appeals, has represented her client throughout these proceedings. The Respondent has also been represented by counsel throughout, although initially by different counsel, with Mr Allsop only being instructed after the ET had

A adjourned part-heard during the liability hearing. Mr Tolley QC has been instructed only on the appeal.

B **The Factual Background and the ET's Liability Findings**

C 4. The Claimant, who was born on 2 May 1978, commenced employment as a prison officer on 28 July 2003, initially working at HMP Feltham (a prison and young offender institution), then at HMP Bullingdon (a category B/C prison), before transferring to HMP Woodhill (a high security, category A prison) on 7 September 2014. The ET found that the Claimant's transfers were made at his request, to advance his career; in particular, he considered that moving to HMP Woodhill and working with high security/category A prisoners would advance his learning and help his career develop. The ET accepted the Claimant's evidence that he had intended to remain in employment up to retirement age (now 68); it further accepted that he would most likely have continued to provide a good service to, and in, the prison service. As the ET found, however, after a series of acts of direct sexual orientation discrimination, harassment and victimisation, the Claimant was unfairly dismissed from his employment with the prison service, a dismissal that also amounted to an act of unlawful victimisation.

F 5. The ET's findings on liability are the subject of its detailed, 88-page, Liability Judgment. The Liability Judgment sets out the full history of the Claimant's difficulties at HMP Woodhill and, at this stage, I can do no more than provide a brief summary drawn from the ET's more detailed narrative.

G 6. The ET found that, soon after his transfer to HMP Woodhill, the Claimant was subjected to harassment related to his sexual orientation, or perceived sexual orientation. This initially took the form of verbal abuse and enquiries about the Claimant's sexuality. One such enquiry was

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A made by the Claimant's line manager, Custody Manager ("CM") Victoria Laithwaite and the Claimant answered that he was bisexual. This information was then passed to others working in the same unit and the harassment intensified and began to include incidents of physical abuse.

B The discrimination and harassment suffered by the Claimant was such that, as early as October 2014 (in only his second month at HMP Woodhill), he had started to ask for help to transfer to a different prison. As well as being asked about his sexuality; the Claimant was regularly called

C "poof", "gay", and "vermin", with even his manager CM Laithwaite calling him "poof" on one occasion. In February 2015, the Claimant was wrongly given an absence warning (an act of direct discrimination), and the abuse seems to have intensified after the Claimant returned from a sickness absence in March 2015. One prison officer pointed his finger into the Claimant's face

D and slapped him and, on different occasions, squirted water at the Claimant and pushed him into a desk. In July and December 2015, the Claimant's work bag was coloured pink and, on the latter occasion, a pink "fairy" cake was smeared inside the bag. His line manager failed to intervene

E when she saw the Claimant abused by other prison officers and herself grabbed his arm (causing bruising) on one occasion and told him he was causing "too many problems". When the Claimant raised a grievance in October 2015, it was not investigated, and, in November 2015, one of the Senior Officers told the Claimant that he would put him "on his arse". In December 2015,

F another prison officer screamed at the Claimant, grabbed his face and dug her fingernails into his face, and his further attempts to pursue grievances were not dealt with. Having raised grievances, which included complaints about the discrimination he was suffering, and having written to his

G MP about his treatment, the Claimant was then victimised, with an allegation of gross misconduct being pursued against him, which culminated in the termination of his employment with the prison service, a dismissal the ET also found to have been unfair.

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7. In the Respondent's skeleton argument for this hearing, it is said that "*This is a case in which the Employment Tribunal took a strong view on liability in the Claimant's favour*". As Mr Tolley QC acknowledged, however, given the evidence before the ET and the findings of fact made (in respect of which there has been no appeal), that "*strong view*" is understandable. This was a case where a man, who had previously had a promising career as a prison officer, suffered from a sustained campaign of bullying and harassment related to what others perceived to be his sexual orientation, and was ultimately driven out of the prison service because he had tried to complain about his treatment. The ET's findings reflect poorly on the prison service and on the particular individuals involved.

The Medical Evidence Relevant to Remedy

8. It was common ground that, as a result of the discrimination he experienced, the Claimant suffered a significant impact to his health. He had previously suffered moderately severe post-traumatic stress disorder ("PTSD") as a result of an assault at HMP Feltham in June 2010, but he had made a gradual recovery after undergoing cognitive behavioural therapy ("CBT") in early 2011 and had been able to return to work, transferring to HMP Bullingdon.

9. As for the effect of the discrimination suffered by the Claimant at HMP Woodhill, although the ET did not set out the evidence relating to the Claimant's symptoms in any great detail, it is not suggested that its reasons were other than "Meek" compliant (**Meek v City of Birmingham** [1987] IRLR 250); the parties do not come to the Remedy Judgment as strangers and are aware of the evidence to which the ET had regard. There was, moreover, no dispute between the parties as to the relevant diagnosis or as to the impairments suffered by the Claimant as a result. For the purposes of the ET proceedings, both parties instructed Consultant Forensic Psychiatrists (for the Claimant, Dr Oyeboode; for the Respondent, Dr Sahota), who were in

A agreement that the Claimant had suffered moderate psychological damage and PTSD. Both
experts spoke of the Claimant's PTSD, depression and symptoms of paranoia, and agreed that he
presented with functional impairments, including low mood, sleep disturbance, and finding it
B difficult on some days to leave the house, attend to his personal care or interact with members of
the public. Where the parties disagreed was as to the future prognosis.

C 10. Dr Sahota (who saw the Claimant on two occasions in March 2019) considered that the
Claimant was suffering from a relapsing mental disorder, but there was insufficient evidence to
conclude that his impairments were permanent. His view was that the Claimant's clinical
presentation might improve with further treatment, suggesting a referral for specialist treatment
D in secondary mental health care (the Claimant had remained under the care of his GP) and
recommending 12 sessions of CBT (the Claimant's evidence was, however, that he had
undertaken CBT in relation to his treatment at HMP Woodhill but had found it had had a negative
E effect on him). Dr Sahota considered it was possible that the Claimant might make a recovery
such that he could return to some form of employment in the future (although not in the prison
environment), albeit he did not feel able to provide any percentage chance of his returning to
work within any period, stating that this question was beyond his expertise and best addressed by
F an Occupational Physician.

G 11. Dr Oyeboode initially saw the Claimant in April 2018, at which stage he diagnosed that
the Claimant was suffering from on-going depressive disorder, generalised anxiety disorder and
PTSD, but was unable to say how long these conditions might continue. After examining the
Claimant in September 2018, however, Dr Oyeboode stated that his presentation had worsened
H and Dr Oyeboode now took the view that the prognosis was poor and the Claimant's condition
was likely to be permanent; a view he confirmed after a further assessment of the Claimant in

A April 2019. Although his further assessment of the Claimant had thus led Dr Oyeboode to
conclude that his condition was likely to be permanent, on 26 September 2018, in response to a
question raised by the Claimant’s solicitors about the prospect of the Claimant returning to work,
B Dr Oyeboode recommended that an assessment be undertaken by an Occupational Health
Physician (although he also made clear that a return to the Claimant’s previous working
environment would not be appropriate). In the event, no occupational health assessment was
undertaken.

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12. Both experts gave evidence at the remedy hearing and, from the notes provided by the
Employment Judge, it is apparent that both were asked questions regarding the Claimant’s return
D to work. Dr Sahota emphasised that he was not giving evidence as an occupational physician but
did not consider the Claimant’s case to be one of such severity that he would not be able to return
to work for over 25 years, albeit he declined to estimate how many years it might take before the
E Claimant could re-enter the labour market and did not feel able to say what reasonable
adjustments might need to be put in place to enable the Claimant’s return to work. Dr Oyeboode
was also pressed to express a view as to when the Claimant might be able to return to some form
of employment, outside the prison setting. He said he was not sure and referred to the Claimant
F having good and bad days, which would give rise to issues of “*reliability and consistency*”,
observing that employers “*Don’t employ someone going off every other week*”. Asked whether
there was a prospect that the Claimant might be able to return to employment “*in 2, 5, 7 years?*”,
G Dr Oyeboode responded that there was a “*possibility, but highly unlikely*”.

The ET’s Remedy Judgment

H 13. A further hearing was listed to deal with the remedy issues in this case. The ET was able
to spend two days reading-in for this hearing and heard evidence and submissions over two

A further days. As the ET recorded, the parties had been able to narrow the issues between them
by this stage and it was agreed that the ET would determine the remaining points of dispute but
that the calculations required as a result would be undertaken by the parties and subsequently
B submitted to the ET.

14. In respect of the non-pecuniary damages claimed, it was agreed between the parties that
this was a case meriting an injury to feelings award in the top band, as described by the Court of
C Appeal in **Vento v Chief Constable of West Yorkshire Police (No. 2)** [2003] ICR 318. The ET
made an award under this head of £41,000. In considering the claim for damages for personal
injury, the ET was mindful of the need to avoid double recovery but accepted Dr Oyeboode's
D evidence that the Claimant had suffered "*a chronic and permanent condition*", finding that this
had a "*significantly debilitating impact ...on ... his day to day activities as set out in his witness
statement, exacerbated by the development of paranoia as detailed in his remedy statement*" (ET
Remedy Judgment paragraph 65); it made an additional award of £18,000 under this head. The
E ET also considered there was evidence of aggravation of injury justifying an award for aggravated
damages of £15,000. In addition, the ET considered the wrongful use of the Respondent's
disciplinary procedures as a vehicle for the victimisation of the Claimant, taken together with its
F withholding, wrongful redaction and corruption of documentation, designed to mislead the
Claimant and others (including the ET), meant that this was a case warranting an award of
exemplary damages of £8,000. No challenge has been made to any of these awards.

G 15. As for the Claimant's claim for past and future loss of earnings, the parties were divided
as to how the ET should determine the base salary for use in calculating the Claimant's losses.
H The Respondent contended that the ET should use the figures from 2015/2016, the last year of
the Claimant's employment; the Claimant argued, however, that this would not properly represent

A his loss as it did not include overtime earnings (referred to as “payment plus” within the prison
service). The Claimant relied instead on his earnings at HMP Bullingdon, for the tax year
B 2013/2014, when he had worked a significant amount of payment plus (he had been able to do so
due to staffing issues at that prison, which were such that prison officers could effectively “*write
their own cheque*” (the Claimant’s description) in terms of the additional work they could do).
C In 2015/16, however, the Claimant had either been absent due to injury or was suspended from
work. The ET accepted that the Claimant’s inability to work any additional payment plus hours
D rendered the 2015/2016 figures inappropriate. The Claimant had also argued that he had been
denied overtime at HMP Woodhill and his earnings there were not indicative of what he would
have earned had he not been treated unfairly. As the ET acknowledged, however, that was not
something that the Claimant had pursued as a separate head of loss.

16. For the Respondent it was argued that opportunities for payment plus had diminished.
E The ET recorded that evidence had been called to the effect that additional recruitment had
reduced opportunities for payment plus but also noted that the Respondent had not produced
figures to show what levels of payment plus were worked over which years by others, either
F individually or collectively, at HMP Woodhill or HMP Bullingdon.

17. Accepting (by reference to a letter from Shared Services of 24 May 2016) that the
G Claimant had worked a significant amount of payment plus both prior to his transfer to HMP
Woodhill and for a period thereafter; the ET considered there was no reason to doubt that he
would have continued to work such payment plus hours as were available. More particularly, the
H ET referenced the fact that, for the tax year 2015/2016, notwithstanding the fact that the Claimant
had been suspended or absent for four months, he had earned more than he had earned in the
preceding tax year. In the circumstances, the ET considered that the most appropriate way to

A assess the base salary for calculating the Claimant's losses to date and for the future was to take an average of the two years contended for by the parties; that, it considered:

B **"15. ... balances the competing arguments as best we are able on the information provided to us, takes into account the availability of payment plus as best we are able and the likelihood that the claimant would have worked such payment plus as was available to him".**

C 18. At paragraph 18 of the Remedy Judgment, the ET held that this should be the basis for calculating the Claimant's base salary for "*loss of earnings, future loss of earnings and pension loss*". Both parties are agreed that the inclusion of pension loss in this respect is in error: it is not in dispute that the Claimant's pensionable pay did not include payment plus. The parties are equally in agreement, however, that this is an error that can be corrected in the final calculations that are to be provided to the ET in due course.

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E 19. The Respondent also objects to the ET's use of the Shared Services letter, rather than the Claimant's actual payslips. For the Claimant it is said that there is very little difference between the figures. Given the view I have formed on the ground of appeal relevant to this question, this is not a dispute that I need to resolve; suffice it to say that the ET adopted a broad-brush approach to the determination of base salary, endeavouring to arrive at a figure that fairly reflected the Claimant's actual loss.

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G 20. As for the period of time for which the Claimant should be compensated, the ET first considered what might have happened but for the unlawful discrimination and victimisation he had suffered. In this regard, the ET found as follows:

H **"22. The claimant had shown, throughout his employment, not only resilience by returning to work from previous incidents where he had been injured in the course of his duties ... but he also enjoyed his work and demonstrated his desire to remain in work even in the face of the discriminatory conduct we have found he was**

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subjected to. At that time, he sought nothing more than a transfer back to HMP Bullingdon ...

23. All of the evidence we have heard indicated that the claimant was liked and respected by the prisoners with whom he worked ... and he was clearly well regarded by the Prison Service as his previous annual assessment indicate.

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24. There is no evidence to suggest that the claimant would have chosen anything other than to continue in his employment and would have continued to enjoy his work. ...”

21. The ET also considered the evidence presented to it in relation to those serving within the prison service more generally, holding as follows:

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“30. We have further considered the fact that on the respondent’s own evidence, those employees who work for more than five years in the Prison Service, had a resignation rate of less than 5%.”

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22. Noting that the Claimant had already worked in the prison service for 13 years, the ET concluded: “*the possibility of his early resignation is therefore, we find, equally remote*” (ET Remedy Judgment paragraph 30).

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23. Projecting forward, the ET recorded that the parties were in agreement that the Claimant would have been promoted to the next grade in the service in 2026 and that he had a 50% prospect of a further promotion in 2041.

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24. As for what the Claimant would be able to do to mitigate his losses, the ET recorded that the difference between the parties’ medical experts related to the question whether the Claimant’s condition would improve with further, and perhaps different, treatment and whether he might ever (and, if so, when) be fit to return to work. The ET set out the differing views it had been presented with on this issue, as follows:

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“27. Dr Sahota said that the claimant “*may*” be fit for work in the future provided that “*reasonable adjustments*” (which were not defined in any way), were in place. Dr Oyeboade said the prospect could not be ruled out, but in his view the claimant’s

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condition was now permanent and unlikely to improve. In that regard, he “*did not hold out much hope*”. Whilst he agreed that the possibility of a return to work could not be ruled out, Dr Oyebode considered the possibility as “*highly unlikely*” and said that even if the claimant was fit for work he would remain unreliable due to his on-going and, in Dr Oyebode’s view, permanent mental condition.

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28. The high point of Dr Sahota’s position was that the claimant “*may*” be fit for work at some indeterminate date in the future, but that would require additional treatment over a period which he could not define and in relation to which there was no guarantee of success. Dr Oyebode commented that further treatment was unlikely to bring about any improvement given, what he considered, the claimant’s chronic condition and his lack of progress having had previous treatment including cognitive behaviour therapy in relation to his current condition.”

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25. As I have already recorded, in relation to the claim for damages for personal injury, it is apparent that the ET accepted Dr Oyebode’s evidence that the Claimant’s condition was likely to be permanent. In considering his claim for damages for future loss of earnings, the ET found that the Claimant’s medical condition was now such that the prospects of his being able to return to any work in the future were “*extremely remote*”, holding:

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“29. ... by that stage, if ever reached, the claimant would need to undergo a lengthy period of retraining and/or rehabilitation into any workplace and he would be very substantially disadvantaged in the labour market when seeking employment after what would be a very lengthy absence from work with significant mental health issues.”

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26. In the circumstances, the ET considered “*this is one of those rare cases where it is appropriate to consider the claimant’s future losses on the basis of a career long basis. The claimant would have remained in work up to retirement age*” (ET Remedy Judgment paragraph 31); concluding that “*it is very unlikely that the claimant will be able to return to work at any stage between now and his retirement age*” (ET Remedy Judgment paragraph 34)

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27. The ET considered the question of deduction for likelihood of early resignation or withdrawal from the prison service pension scheme, but considered that this would have been “*highly unlikely*” (ET Remedy Judgment paragraph 34):

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“34. ... He enjoyed the work, he had shown resilience to return to work after previous incidents and still wished to return to work until he was, unfairly and as an act of victimisation, dismissed from the Prison Service”.

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28. In those circumstances, the ET considered no more than a minimal 5% discount – reflecting both “*the very slight prospect of the claimant retiring from the Service before his pension age and the equally remote prospect of recovery and a return to work*” - was warranted (Remedy Judgment paragraph 35).

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29. There was further agreement between the parties that this was a case in which it was appropriate for an uplift to be made to the sums awarded by the ET for failure to follow the **Acas Code on Discipline and Grievance**; the Claimant sought an award at the highest level (25%), whereas the Respondent urged that this should be only 10%.

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30. The ET stated that, although the Respondent had followed a process - in that it had conducted an investigation, held a disciplinary hearing and allowed an appeal - this was “*essentially a case of “going through the motions”*” and had “*lacked fairness and impartiality, was predetermined and was, as we have found, an act of victimisation*” (ET Remedy Judgment paragraph 69). Having concluded that “*it is only to a minimal degree that the respondent has complied with the Acas Code and has done so in form rather than in substance*” (ET paragraph 70), the ET awarded the Claimant an uplift of 20%.

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31. Having reached its determinations on the points in issue before it, the ET provided its Remedy Judgment, leaving it to the parties to then agree the precise calculations (presumably to include discount for accelerated receipt (not addressed in the ET’s determination of the issues between the parties at the remedy hearing)), which would then be written up in a final supplementary Judgment.

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A Costs

32. In addition to making findings adverse to the Respondent on the facts, in its Liability Judgment the ET was very critical of the way in which the litigation had been conducted. In particular, the ET stated that the reason the liability hearing had taken so long to complete was very largely due to the Respondent, explaining:

“12. First, the respondent had failed and continued to fail right up to and beyond the end of the first 12 days of the hearing (at which point the matter was adjourned from May to October this year) to give full and proper disclosure of documents to the claimant. We will identify in this judgment our concerns in this regard as they emerged but they included non-disclosure of obviously relevant documents, disclosure of two versions of what were purportedly the same document without explanation and the inappropriate redaction of documents. Over 150 pages of documents were disclosed during this hearing, none of them could be considered anything other than relevant.

13. Second, in relation to the respondents witnesses the preparation that had been made (or not) before they gave evidence (a number of the respondent’s witnesses had had not, according to their sworn evidence, been made aware of the allegations that the claimant made and had not been directed to relevant sections of the volumes of documents which were before the tribunal) caused some delay. This was compounded by the approach taken to questions posed in cross-examination, and from the tribunal. We have commented on the evidence as appropriate below, but (with the exception of Governor Kerr) all the senior officers of the respondent who gave evidence before us were guilty of obfuscation and gave evasive answers to often the most simple of questions. All of this resulted in this case occupying more time than it should have done.

14. Third, even in the face of admissions on oath by the respondent’s witnesses, a refusal by the respondent to concede any point of issue before the tribunal, meaning that all matters had to be put to a series of witnesses.”

33. At a relatively early stage during the liability hearing, given the on-going difficulties with disclosure, on 16 May 2018, the Claimant applied to strike out the Respondent’s response in the ET proceedings. This was mid-way through the Claimant’s evidence, when – having confirmed that there was no further documentary evidence to disclose – the Respondent was continuing to produce further relevant material on an almost daily basis. The application was set out in written form in a Claimant’s skeleton argument for this purpose. This document made clear that:

“1. Under Rule 37(1)(b) and (e) of Schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Claimant makes the following applications on the basis of the Respondent’s flagrant non-compliance with previous Tribunal orders as to disclosure, its flagrant failure to comply with the ongoing duty of disclosure and its eventual drip-feed style of disclosure of core contemporaneous documents, seeming dating back to 2015, on Day 4 and Day 5 of the hearing, towards

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the end of the Claimant's cross-examination. The Claimant applies for an Order that:

- 1) the Respondent's response to all or part of the claims is struck out; alternatively,
- 2) the Respondent is barred or restricted from participation in the proceedings
- 3) the Respondent pays the Claimant's costs of this hearing. In this regard the Claimant reserves the costs application to the conclusion of the hearing."

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34. As it is relevant to the second appeal before me, I note at this stage the Claimant's express reservation of the application for costs to the conclusion of the hearing; a position Ms Braganza maintained in her oral submissions on the strike out application.

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35. The ET ruled on the strike out application on 18 May 2018. The parties have agreed a note of the ET's ruling in this regard, to which I have been referred on this appeal and from which I have taken the extracts set out below. The ET was very critical of the Respondent's conduct but considered it was still possible to have a fair trial such that the default was not sufficient to warrant striking out the response and could, instead, be addressed by way of a lesser sanction by making an award of costs. The ET therefore ruled:

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"... the Respondent is ordered to pay the costs for the extended length of this hearing – extended by four days (days 5,6,7,8) caused by the unreasonable behaviour and conduct of the Respondent."

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36. The ET's reasons in this regard were explained, as follows:

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"... we do not think default sufficient of itself to strike out – we do not find there is no reasonable prospect of success, nor do we find that a fair trial is no longer possible so for those reasons a lesser sanction is appropriate in costs, R conduct disruptive and unreasonable re disclosure of documents and witness availability.

Now Day 9 and we are just to start R's evidence – after that 3 days remain, original listing would be 6 and a further 6 days after these are required for evidence and submissions, not without deliberations and production of judgment. If we were going to list for a further six days – and being cautious then 7 – then it would be four days longer than the original listing – cross examination has taken four days longer – then submissions done, appropriate exercise discretion under 76(1)(a) and consider whether to exercise discretion and we do and appropriate to order R to pay to C all costs relating to four days – days 5, 6 7 and 8 assessed if not agreed assessed on an indemnity basis CPR 44.3(1)(b) and we say that because R's conduct has been so serious as to warrant such an order."

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37. I understand that directly after the ET's ruling on the strike out application, the Respondent produced a further ring-binder of documents. Subsequently, the hearing was adjourned part-heard to October 2018. There was a case management hearing on 13 June 2018, with yet further disclosure taking place both before and after that hearing.

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38. Following the hearing on remedy, on 16 May 2019, the Claimant made an application for costs, which was addressed by the ET in a further Judgment – the Costs Judgment - in which it also recorded its earlier costs ruling of 18 May 2018. Given the issues raised by the second appeal, it is helpful to set out the formal part of the ET's Costs Judgment in full:

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“1. In accordance with the Judgment delivered on 18 May 2018 when the claimant's application to strike out the respondent's response was refused but an order for costs was made, the respondent is to pay the claimant's costs of the 5th, 6th, 7th and 8th days of the Merits Hearing (14-17 May 2019 inclusive) on an indemnity basis to be assessed if not agreed.

2. The respondent is to pay one third of the remainder of the claimant's costs of the claim on the standard basis to be assessed if not agreed.

3. No order is made on the claimant's application for a wasted costs order which is dismissed.”

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(The reference at paragraph 1, to 14-17 May 2019, should read “*14-17 May 2018*”)

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39. The ET further referred back to its earlier costs ruling from May 2018 within its written reasons, as follows:

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“3. As can be seen from the Judgment delivered following the hearing, significant criticism was made of the respondent's conduct of the proceedings. Indeed, the respondent's failure to properly deal with the issue of disclosure of documents, including the repeated piecemeal disclosure of documents in the early days of the Full Merits Hearing led to the claimant making an application to strike out the response part way through the hearing.

4. That application was refused on 18 May 2018 but an order for costs was made. The Tribunal determined that the respondent's conduct in relation to the issue of disclosure during the hearing had led to the effective loss of four days of Tribunal time. The respondent was ordered to pay the costs of those four days of lost time on an indemnity basis, to be assessed if not agreed.”

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A 40. Noting that the Claimant was now (i.e. in May 2019) making an application for the entire
costs of the case, the ET recorded the Respondent's objection that the earlier ruling, on 18 May
B 2018, had drawn a "*line in the sand*" in relation to events up to that date, such that the issue of
costs in relation to the matters addressed in dealing with the strike out application could not be
revisited (see ET Costs Judgment, paragraph 6).

C 41. The ET disagreed, explaining its position as follows:

"7. We do not accept that to be the case. At the time the application to strike out
was considered, there had been a waste of four days of Tribunal time. That time
had been lost as a direct result of the respondent's piecemeal disclosure of
documents, some of which had previously been said not to exist and/or some of which
were a requirement of either of the respondent's own internal processes ... or the
general Law

D 8. The Tribunal was told by Counsel, on instructions from the respondent, that the
documents relating to an internal investigation did not exist, yet the following day
they began to appear, without explanation as to who found what, where and how.

E 9. At that time the question was whether the respondent's case had no reasonable
prospect of success and/or whether a fair trial of the issues was still possible. The
order for costs was made because the respondent's conduct had been disruptive and
unreasonable regarding the piecemeal disclosure of documents and issues regarding
witness availability during the hearing. The order was made purely on that basis
and on the basis of the extended length of the hearing which had been thereby
immediately caused, the loss of the 4 days of the hearing and on no other basis.

10. Accordingly, we consider that the claimant's application for costs in relation to
the period up to and including the 13 May 2018 falls to be considered as part of the
applications now made, although clearly the costs of 14-17 May 2018 inclusive have
already been the subject of an order."

F 42. In addressing the May 2019 costs application, the ET recorded the Claimant's reliance on
aspects of the Liability Judgment as warranting an order for costs on the basis of the Respondent's
unreasonable conduct, in particular:

G "12.1 The very late concessions made by the respondent including as to the "*statutory
defence*" under Section 109 of the Equality Act 2010 (abandoned at the
commencement of the hearing) and the respondent's position expressed in closing
submissions that it had no positive case to advance on the fairness or otherwise
(including the question of procedural fairness) of the claimant's dismissal ...;"

H 12.2 The delays to the hearing caused by the issues of disclosure and the conduct of
witnesses, several of whom had not been made aware of the allegations made by the
claimant and had not been directed to any of the relevant parts of the substantial
bundle of documents to which their evidence related, including the conduct of all
but one of the respondent's Senior Officers called to give evidence (Governor Kerr)

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... they were guilty of obstruction and evasion during cross examination, including in one case engaging in verbal jousting with the claimant's Counsel and challenging her as to how she questioned him when she was doing so appropriately and properly. 12.3 The claimant further points to the refusal by the respondent to make any concessions in the face of admissions, on oath, by the respondent's own witnesses ...; 12.4 The evasive and unreliable evidence of the respondent's witnesses ...; the tampering with an email from the Governing Governor, the unacceptable redaction of documents ... and the misleading nature of the pleadings ...;

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12.5 The fact that the Officer instructed in relation to the claimant's grievances did not know he was conducting a grievance enquiry ...; and 12.6 Perhaps most seriously, given the identity of the respondent, the forgery by late production and back dating of documents ... designed to "*plug gaps*" ... or to confuse and mislead"

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The ET further noted:

"13. It is by no means the case that all of this was apparent by 18 May when our Judgment was delivered on the strike out application and as we have said, that Judgment dealt with specific delay, i.e. the loss of 4 hearing days caused by the respondent's conduct, and no other findings were made."

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43. Addressing the Respondent's conduct of the proceedings more generally, the ET considered it had demonstrated that the ET orders, in particular in relation to disclosure, had been treated with contempt and in "*an attempt to mislead not only the claimant but the Tribunal*", which had put the Claimant to unnecessary cost and "*has caused delays in the process and has extended the time spent in this matter beyond the four days subject of the earlier Judgment*" (ET Costs Judgment, paragraph 14).

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44. The ET did not, however, accept that the Respondent had been conducting a case that, throughout, had no reasonable prospect of success (indeed, the Claimant had not succeeded on every aspect of his claim), and it noted that the Claimant would have been bound to have incurred some of his costs in any event. That said, the ET was satisfied that its costs jurisdiction was engaged: the Respondent's conduct of the proceedings had been "*unreasonable*":

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"19. ... Their disregard of the basic rules of disclosure, their corruption of documents by conflation, amendment or post dated creation demonstrates in our view a clear desire to obstruct the claimant's presentation of his legitimate claims,

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to place themselves above the rules of procedure and to mislead not only the claimant but also the Tribunal.

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20. Further witnesses were ill prepared, obstructive in their conduct and have given evidence which has been unreliable, including the giving of evidence based on a document which ... was untrue. Even if the conflation of two different applications by two different individuals for transfer onto one form was not designed to mislead, it did so because it misled more than one of the respondent's own witnesses and forced the claimant to give evidence and to cross examine those witnesses and challenge the veracity of their evidence based on the document.

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21. That is but one example of who the claimant has been put to unnecessary extra work and cost due to the failings of the respondent. Those failings go beyond error. They have been wholly unreasonable and have been disruptive to the proceedings. They have not arisen by accident but by design as to the wholesale denial of the existence of documents which subsequently appeared, the post-dated creation of documents designed to "*plug the gaps*" and the alteration of documents does not, and we find in this case did not, happen by inadvertence."

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45. Having reflected on the earlier costs order made, together with the impact of the Respondent's conduct on the proceedings as a whole and the fact that the Claimant was bound to incur substantial costs in preparing his claims, irrespective of the aggravating features of the Respondent's conduct, the ET concluded that an additional award should be made in respect of one third of the remainder of the Claimant's costs, to be assessed if not agreed. In this regard, the ET took the view that ultimately the fault lay with the Respondent and not the lawyers and it duly declined to make a wasted costs award in this case.

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The Remedy Appeal and the Respondent's Submissions

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46. The Respondent's appeal against the ET's Remedy Judgment is put on five grounds, albeit there is some overlap between the points of challenge. Before descending to the detail of those grounds, however, Mr Tolley QC made the following four general observations: (i) on the ET's findings, the overall sum to be awarded for future pecuniary losses was in the region of £2 million, which gave rise to a real danger of overcompensation; (ii) there seemed to be a desire on the part of the ET to punish the Respondent but, save in respect of the awards for exemplary damages and (at least to some degree) in relation to the Acas uplift, that was not appropriate, even allowing for this having been an exceptional case in certain respects; (iii) the award of compensation was

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A being made on a once and for all time basis and thus required greater caution as predictions as to
the future would inevitably be less reliable over a longer time period; (iv) the ET's failure to refer
to guideline authority (in particular, to **Wardle v Credit Agricole Corporate and Investment**
B **Bank** [2011] ICR 1290), and to the relevant legal principles there set down, gave rise to a
legitimate question as to its approach.

C 47. By the first and second grounds of appeal, the Respondent takes issue with the ET's award
of future loss of earnings on a whole-career basis. The Respondent contends that the ET adopted
the wrong approach to career loss and reached a perverse decision in this regard and in its failure
to make more than a 5% reduction. The Respondent's submissions on these grounds overlap and
D can be summarised, as follows:

(1) Save for the reference to this being "*one of those rare cases*" (ET Remedy Judgment
paragraph 31) – a possible use of the language used in **Wardle** - the ET made no reference
E to the relevant case-law, or to any of the guiding principles there laid down.

(2) On the material before the ET, it was not possible to conclude that the Claimant would
never work again in any capacity. Its decision to treat this as a career-long-loss case was
F perverse, given: (i) the Claimant was only 40 at the date of the remedy hearing (28 years
away from retirement); (ii) the agreed medical diagnosis was only of *moderate* PTSD and
depression and the Claimant had not undertaken specialist treatment, as recommended by
G Dr Sahota, which might improve his prognosis and his chance of returning to
employment; (iii) the possibility that the Claimant might undertake re-training and the
reasonable adjustments that might be made by other employers, consistent with their
obligations under the **Equality Act 2010**. More generally, the ET had wrongly conflated
H its view on the evidence as to the medical prognosis with the non-medical assessment of
whether the Claimant would be able to work again.

A (3) Even if the evidence allowed for the possibility that the Claimant would never work again,
B the ET erred in adopting an absolutist, all or nothing, approach. Although the ET was
entitled to proceed without occupational health evidence, it needed to have regard to the
C increased degree of speculation it was undertaking and to take into account future
possibilities on a sliding scale basis: the longer the period of prediction, the greater the
likelihood the assessment would be proved wrong and, therefore, the greater the need for
circumspection. A finding of 95% loss over a 28 year period was bound to
overcompensate. The ET's discount figure of 5% related to retention within the prison
service but was used for *all* vicissitudes of life; even if it had been entitled to start with a
lower percentage, it needed to recognise the increase in uncertainty over the longer period.

D 48. The third and fourth grounds of appeal relate to the ET's approach to the calculation of
the Claimant's base salary, used in calculating the multiplicand to be applied in this case. On
E these grounds, the Respondent submits:

(1) The loss arising from the Claimant's dismissal had to be attributable to the specific acts
found to have constituted unlawful discrimination; it had not been open to the ET to
F entertain the Claimant's argument at the remedy stage that he had wrongfully been denied
payment plus.

(2) The Claimant had argued for an earlier period of employment to be used in calculating
his base pay, as that included a higher amount of payment plus; the Respondent had relied
G on the year preceding the dismissal. Even if the ET had been entitled to take into account
the earlier year in calculating base salary as an average, there was no principled
justification for simply taking the two years relied on by the parties rather than (say) the
H three years preceding dismissal.

A (3) In oral submissions (albeit not in the grounds of appeal), Mr Tolley QC also made the
point that the ET's finding on payment plus failed to allow for future contingencies over
B time. Although it had referred to the Respondent's evidence as to the diminution of
overtime opportunities, it had failed to take account of the further uncertainties in its
prediction as to the Claimant's likely working patterns into the future.

C 49. By the fifth ground of appeal, the Respondent contends that the ET erred in awarding a 20%
uplift, when it had failed to consider the absolute financial value or impact of so doing before
settling on the final adjustment figure; this gave rise to an error of law (see Acetrip Ltd v Dogra,
D unreported, EAT (18 March 2019), UKEAT/0238/18). Although the ET would have been aware
of the overall sum of compensation in issue, given the large size of the underlying award (on the
premise of the decisions the ET had made), and the punitive nature of the section 207A
E TULR(C)A uplift, it was required to expressly consider and address the principle of
proportionality in its Judgment. The ET's reasoning made clear, however, that, in setting the
percentage uplift, it had only considered the nature and degree of the Respondent's compliance
with the **Acas Code on Disciplinary and Grievance Procedures** (2015); it gave no
F consideration to the absolute value of a 20% uplift, or to the proportionality of awarding that
uplift, in the context of its prior findings of career loss.

G 50. In oral submissions, the Respondent further questioned whether it had been open to the ET to
award a percentage uplift of more than 2%. Although the Respondent had argued for a 10% uplift
before the ET, that had been premised on a Counter-Schedule that assumed a more limited (two
year) loss of earnings. Having regard to the observations made in Wardle, regarding the
H appropriate percentage uplift under earlier, analogous, statutory provisions, it was wrong to award
a significant uplift to what was already a very large compensatory award.

A The Remedy Appeal – the Claimant’s Submissions

51. The Claimant made the following, general submissions as to how I should approach this appeal: (i) the ability of the EAT to interfere with the ET’s decision was limited (see **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672), particularly where (as here) there was no challenge as to the adequacy of the ET’s reasons, which carefully set out the issues it was required to determine, demonstrated it had applied the relevant legal principles, and clearly set out its conclusions; (ii) standing back, on a review of the written and oral evidence before the ET, it could not properly be said to be perverse to view this as a career-loss case, or to adopt a broad approach to the calculation of base salary to reflect the different sums received in different years, or to award an uplift at the higher end; (iii) on appeal, it was impossible to do justice to the extent of the evidence and submissions considered by this experienced ET, which had a vast amount of material before it when considering the more limited issues arising at the remedy hearing; (iv) this was an exceptional case in all respects and the very high level of the award made was founded on the evidence and, on the ET’s findings, properly reflected the Claimant’s loss; (v) in particular, the evidence was that the Claimant had suffered a serious mental illness as a result of the Respondent’s discrimination.

52. Turning then to the first and second grounds of appeal and the question of career loss, the Claimant contends that the ET neither erred in its approach nor reached perverse findings. The ET had been directed to the guidance set out in **Wardle** and the language it had used (looking at likelihood, rather than the balance of probabilities, and concluding that this was “*one of those rare cases*” where it was appropriate to assess loss on a career-long basis) made clear it had applied the correct approach. As for the question of perversity, the issue on the expert medical evidence was whether the Claimant’s mental illness, which was such that he was unable to work, was permanent. The ET preferred the oral and documentary evidence of the Claimant’s expert,

A Dr Oyebode, to that of the Respondent, permissibly rejecting the evidence of Dr Sahota that the Claimant “*may*” be able to work at some unparticularised point in the future. Once the ET accepted the evidence of Dr Oyebode, that the Claimant would be unable to work again, there was no sliding scale that could be applied to that finding.

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53. As for the third and fourth grounds of appeal, the Claimant contends that the ET’s approach to the calculation of base pay was neither flawed nor its findings perverse; rather, as it made clear, faced with the evidence presented to it, it had assessed base salary as best it could. In so doing, it expressly accepted the Respondent’s argument that the Claimant could not raise a new allegation of having been wrongfully denied payment plus. On the other hand, the ET explicitly found that the most recent pay figures for the Claimant did not accurately reflect his past level of earnings, as he had spent some of that year absent or suspended and so unable to carry out any overtime. It was in that context that the ET permissibly had taken the average of each of the years relied on by the parties.

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54. As for the fifth ground of appeal, and the award of a 20% uplift, the ET did not have all the final monetary figures before it as, with the agreement of the parties, these were to be calculated following its decisions on the issues as set out within the Remedy Judgment. The ET did, however, understand the level of the sums involved (that was apparent from the Claimant’s Schedule of Loss) and the Respondent had neither suggested that it was unable to make a percentage uplift at that stage nor that it should make an award at a level lower than 10% (the percentage suggested by the Respondent). The ET explained its reasons for the 20% award and also repeatedly referred to the overall value of the award throughout the Remedy Judgment.

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A **The Remedy Appeal – The Relevant Legal Principles**

55. In considering the remedy appeal, the starting point is section 124 of the **Equality Act 2010**, which (relevantly) provides:

B “124 Remedies: general

(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).

(2) The tribunal may—

...

C (b) order the respondent to pay compensation to the complainant;

....

(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court”

D 56. Thus, as the case law makes clear, where compensation is ordered, it is to be assessed in the same way as damages for a statutory tort (**Hurley v Mustoe (No 2)** [1983] ICR 422, EAT); that will require that “*as best as money can do it, the [claimant] must be put into the position she would have been in but for the unlawful conduct of [her employer] ...*” (**Ministry of Defence v Cannock** [1994] ICR 918, EAT, per Morison J at p 936).

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F 57. When considering compensation for loss of earnings, the ET is not making a determination of fact, as such; rather, it is required to make its best assessment as to what the position would have been, but for the unlawful conduct, having regard to all the material available (see **Cannock** at p 951). In **Vento v Chief Constable of West Yorkshire Police (No. 2)** [2003] ICR 318, the

G Court of Appeal explained the exercise thus to be undertaken by the ET, as follows:

H “33. ... this hypothetical question requires careful thought before it is answered. It is a difficult area of the law. It is not like an issue of primary fact, as when a court has to decide which of two differing recollections of past events is the more reliable. The question requires a forecast to be made about the course of future events. It has to be answered on the basis of the best assessment that can be made on the relevant material available to the court. ...”

A 58. So, when assessing future losses, the ET is required to focus on the degree of chance; it is not
engaged upon a determination on the balance of probabilities (see Abbey National plc v
B Chagger [2010] ICR 397, CA at paragraphs 76-78). In carrying out that assessment, the weight
to be given to the material available will be for the ET, and will inevitably be case-specific. In
C Cannock, the EAT placed some emphasis on the statistical material available; in Vento (No.2),
the Court of Appeal agreed such evidence could be relevant but also allowed that an ET might be
“plainly and properly influenced by the impression gained by it in seeing [the Claimant] give
D evidence at the lengthy liability and remedies hearings” (paragraph 40, Vento (No.2)). In any
event, where an ET properly undertakes the assessment required of it, its decision will not be
susceptible to challenge unless it can be shown to be perverse: an appellate tribunal will not be
entitled to interfere with the ET’s conclusion simply on the basis that it would itself have reached
a different conclusion on the same materials (see paragraph 38, Vento (No.2)).

E 59. More generally, the EAT’s approach, when considering the reasoning provided by an ET,
will be governed by the following principles (as set out most recently by the Court of Appeal (per
Popplewell LJ, at paragraphs 57-58) in DPP Law Ltd v Greenberg [2021] EWCA Civ 672):

F “57. ...

(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. ...

G (2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be *Meek* compliant (*Meek v Birmingham City Council* [1987] IRLR 250). ...

H (3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind.

58. Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not

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applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.”

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60. Further guidance as to the approach to be adopted in assessing future loss of earnings was provided by the Court of Appeal in the case of Wardle v Credit Agricole Corporate and Investment Bank [2011] ICR 1290 (see the Judgment of Elias LJ, with whom the other members of the Court agreed). In submissions in the present case, both parties have referred to the summary of that guidance as set out in *Harvey on Industrial Relations and Employment Law* Division L [881.01], as follows:

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“(1) where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the claimant would find an equivalent job is the wrong approach;

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(2) in the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the claimant securing an equivalent job as time went by;

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(3) applying a discount to reflect the date by which the claimant would have left the respondent's employment anyway in the absence of discrimination was not appropriate in any case in which the claimant would only voluntarily have left his employment for an equivalent or better job; and

(4) in career-long-loss cases, some general reduction should be made, on a broad-brush basis (and not involving calculating any specific date by which the claimant would have ceased to be employed) for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons.”

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61. Although Elias LJ in Wardle opined that career-long-loss cases would be “rare”, he made clear that was not because “*the exercise is in principle too speculative*”:

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“50. ... If an employee suffers career loss, it is incumbent on the Tribunal to do its best to calculate the loss, albeit that there is a considerable degree of speculation. It cannot lie in the mouth of the employer to contend that because the exercise is speculative, the employee should be left with smaller compensation than the loss he actually suffers. Furthermore, the courts have to carry out similar exercises every day of the week when looking at the consequences of career shattering personal injuries. Nor do I accept a floodgates argument. The job of the courts is to compensate for loss actually suffered; if in fact the court were to conclude that this required an approach which departed from that hitherto adopted, then we would have to be willing to take that step.

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...

53. Exceptionally, a tribunal will be entitled to take the view on the evidence before it that there is no real prospect of the employee ever obtaining an equivalent job. In such a case, the tribunal necessarily has to assess the loss on the basis that it will continue for the course of the claimant's working life. *Chagger* is an example of such a case. By the time the tribunal came to assess compensation in his case he had already been out of a job for some years. The evidence was that he had made every effort to obtain employment in his chosen field, having made countless applications for new employment. There was a suggestion that he had been stigmatised in the eyes of other employers as a result of the manner of his dismissal. He had taken reasonable steps to mitigate his loss by going into teaching. In these circumstances the Tribunal was entitled to conclude that he had suffered permanent career damage and should be compensated accordingly. Where such a loss is established, a tribunal has to undertake that task, however difficult and speculative it may be.”

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62. In Wardle, the ET had approached the question of future loss of earnings on a career-long-loss basis, but then reduced the overall sum that would otherwise have been due: first, to reflect its finding that there was an 80% chance that Mr Wardle would have left his employment after a further couple of years in any event; second, to reflect its finding that there was a 70% chance that Mr Wardle would have returned to equivalent employment after a further year. Given the latter finding, the Court of Appeal held that the ET had been wrong to approach compensation on a whole career basis but, even had it been entitled to calculate loss over Mr Wardle's whole career, observed that the ET would then:

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“56. ... have had to assess what the claimant would have been likely to earn over that period had he not been treated unlawfully compared with what he is now likely to earn. The difference would then be subject to reductions to reflect the vicissitudes of life (eg the possibility that he might have been fairly dismissed anyway or the risk that he would die or might have to retire early) ...”

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63. As Elias LJ concluded, that was not done by merely applying a reduction to reflect the ET's finding that there was a 70% chance of Mr Wardle's obtaining equivalent employment within

A three years: having recognised that Mr Wardle had a 70% chance of obtaining equivalent
employment within three years, the ET's decision ought also to have allowed for the yet greater
B chance that he would mitigate his losses over the years that would then follow. On that basis, an
ET would need to consider applying an upwards-sliding scale of discounts to sequential future
slices of time, to reflect the progressive likelihood of securing an equivalent job over the years.

C 64. The case-law also makes clear that an ET should maintain a due sense of proportion in terms
of the overall award made; as the EAT warned in Cannock:

D “Tribunals [should] ... not simply make calculations under different heads, and then
add them up. A sense of due proportion involves looking at the individual
components of any award and then looking at the total to make sure that the total
award seems a sensible and just reflection of the chances which have been assessed.”
(per Morison J, p 950)

E 65. This is a point emphasised by the Respondent in the present case, in particular in relation to
the uplift awarded under section 207A **TULRCA**. Section 207A (relevantly) provides:

F “(2) If, in the case of proceedings to which this section applies, it appears to the
employment tribunal that—
(a) the claim to which the proceedings relate concerns a matter to
which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to
that matter, and
(c) that failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the
circumstances to do so, increase any award it makes to the employee by no more
than 25%.”

G 66. There was no dispute before the ET that the **Acas Code on Disciplinary and Grievance
Procedures** (2015) (“the Code”) applied in this case and that the Respondent had failed to comply
with **the Code**. Furthermore, the Respondent did not seek to contest that its failure of compliance
had been unreasonable or that it would be just and equitable for an uplift to be applied to the ET's
final award. Although not a submission made below, the Respondent now objects that the ET

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A ought not, however, to have proceeded to award a 20% uplift before it had reached any final determination of the actual sum due to the Claimant.

B 67. On this point, the Court of Appeal’s Judgment in **Wardle** again provides some assistance, albeit in the context of a different statutory regime. At the relevant time, section 31 of the **Employment Act 2002** provided that, save in “*exceptional circumstances*” in which it would be “*unjust or inequitable*” to do so, a failure to comply with a relevant statutory procedure would
C require the ET to award an uplift of at least 10%, allowing that to be increased by up to 50% if it considered it “*just and equitable in all the circumstances to do so*”. Noting that the Court of Appeal in **Chagger** had held that the size of the award could itself be an “*exceptional circumstance*” (allowing that in that case the ET had been entitled to limit the uplift to 2% simply
D because the compensation (over £2 million) was so large), Elias LJ opined:

E “15. ... in my judgment it would be illogical if the size of the award were not also a potentially relevant factor when the tribunal is exercising its discretion whether or not to increase the compensation The principle of proportionality is equally applicable in those circumstances. The size of the award ought in an appropriate case to be a factor informing the tribunal's determination of what is just and equitable under that provision. No doubt in most cases where the compensation is modest it will not affect the tribunal's analysis. But in other cases it can be a highly material consideration.

F 16. It follows that I do not accept the claimant's submission that unless the tribunal finds the case to be exceptional, it cannot have any regard to the amount of the award when exercising its discretion ...

17. Mr Jeans [leading counsel for the employer] submitted that if the Tribunal ought to have had regard to this factor and did not, then given the size of the award in this case, its decision was inevitably flawed and for this reason alone must be set aside. The EAT accepted that submission and so do I.”

G 68. Considering whether the ET had been entitled to apply a 50% uplift in **Wardle**, Elias LJ first reflected on the purpose of the provision and how this might inform the approach to be adopted. In much of the case-law, section 32 had been seen as essentially punitive but Elias LJ considered
H it might also have a compensatory element: culpability might not be the only relevant factor, the

A degree of harm caused (for example, by false allegations of fraud or dishonesty that the employee has to challenge in the ET because of the denial of a fair internal process) could also inform the size of the uplift (**Wardle**, paragraphs 19-23). In either case, however, the structure of section 32 required an ET to explain what facts or circumstances surrounding the failure made it just and equitable to go above (or below) the 10% starting point. In this regard, Elias LJ considered it would be “*only in the most egregious of cases*” that an increase to the maximum would be justified (**Wardle** paragraph 26).

69. Having established the appropriate uplift, Elias LJ stated that the ET would then need to consider “*how much this involves in money terms*”, observing:

“27. ... this must not be disproportionate, but there is no simple formula for determining when the amount should be so characterised. However, the law sets its face against sums which would not command the respect of the general public, and very large payments for purely procedural wrongdoings are at risk of doing just that. The EAT referred to the case of *HM Prison Service v Johnson* [1997] ICR 275 when Smith J, as she then was, observed, with respect to the level of compensation for injury to feelings, that it was necessary to have regard to “the view which members of the public would have to the amount of the award.” In my judgment, that is *a fortiori* the case where the award is either unrelated, or at least only partially related, to any specific injury to, or loss suffered by, the employee.

28. In considering the sort of sum which would be proportionate and acceptable, it is, in my view, of some relevance to have regard to the sums which the courts are willing to award for injury to feelings and for aggravated damages. The former cases involve compensation for injury but they could bear some comparison with cases where the employee feels aggrieved at losing the opportunity to try to correct what he or she sees as an injustice. Aggravated damages are exceptionally awarded in discrimination cases where there is malice or spite, or the complaints of the employee have been trivialised. That is often more offensive to the employee than a simple failure properly to follow procedures. The level of awards for injury to feelings was laid down by the Court of Appeal in *Vento v Chief Constable of West Yorkshire* [2003] ICR 318. The court held that the most serious case should attract an award of compensation no greater than £25,000 (now slightly adjusted to take account of inflation since then: *Da'Bell v NSPCC* [2010] IRLR 19. The sum of £65,000 awarded in that case by the Employment Tribunal was held to be seriously out of line. For aggravated damages, the amounts are in fact much lower and rarely exceed £5,000. (That was in fact the sum awarded in *Vento* in addition to the compensation for injured feelings.)

29. I do not suggest that these are entirely analogous situations, but I think that save in very exceptional cases, most members of the public would view with some concern additional payments following an uplift for purely procedural failings which exceeded the maximum payable for injured feelings.

A 70. In Acetrip Ltd v Dogra, unreported, EAT (18 March 2019), UKEAT/0238/18, it was
common ground that the guidance in Wardle must also apply to the successor regime under
section 207A TULRCA (see Acetrip, paragraphs 92-104); specifically, the EAT (HHJ
B Auerbach, sitting alone) took the view:

“102. ... where the Tribunal is considering making an award of an ACAS
adjustment of a certain percentage which, having regard to the size of the underlying
award, would be of a significantly large amount in absolute terms, it is an error for
the Tribunal not to consider the absolute financial value or impact, before settling
on the final adjustment figure.”

C observing:

“103. There is, inevitably ..., a punitive element to an adjustment award under these
provisions, because the Tribunal is not simply compensating a claimant for some
additional readily identifiable or quantifiable loss that he has suffered. The
adjustment is bound, to a degree, to be reflective of what the Tribunal considers to
be the seriousness and degree of the failure to comply with the ACAS Code on the
D employer's part. However, the fact that it has a punitive aspect to it makes it ... all
the more incumbent on the Tribunal to consider the absolute value of its award, if
that absolute value is likely to be significantly large, and bearing in mind that, in
fixing on the amount which it considers just and equitable, the Tribunal must have
regard to justice and equity to both parties.

E 71. In Banerjee v Royal Bank of Canada [2021] ICR 359, whilst no reference to Acetrip is
apparent from the report, a different composition of the EAT (Lord Summers sitting alone) came
to the same conclusion. Having referred to the guidance provided in Wardle (supra), Lord
Summers continued:

“6 ... in fixing the ACAS uplift the Tribunal should ... hear evidence about quantum
before fixing the appropriate percentage. No doubt in some cases it is not necessary
to hear evidence on quantum. If the sums involved are modest the Tribunal may
not consider that it is necessary to establish the multiplicand since it can foresee that
the final figure will be within an acceptable range. But in some cases, detailed
evidence of quantum will be critical.

G 72. In Banerjee, the ET had initially (and at the invitation of the parties) applied a percentage
increase without making any reference to the monetary consequences. It had subsequently
reconsidered that decision of its own motion, a course that the EAT considered had been open to
H the ET, allowing it the opportunity to correct its earlier error in this regard.

A The Remedy Appeal – Discussion and Conclusions

73. In deciding the appropriate award of compensation, the ET had first to determine whether this was a whole-career-loss case. In most cases it will be inappropriate for an ET to embark upon the exercise of assessing loss over a career lifetime because it will generally be possible to determine the likelihood of the employee obtaining equivalent employment within a shorter time period. If that can be done, an award of compensation up to the time when the employee is likely to obtain that equivalent employment will fairly assess the loss that is likely to be suffered.

74. In the present case, the ET found that “*it is very unlikely that the claimant will be able to return to work at any stage between now and his retirement age*” (ET Remedy Judgment, paragraph 34). It was on that basis that it concluded (adopting the language used in **Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290) that this was one of those rare cases where it would be appropriate to consider the Claimant’s future losses on a career-long basis. That the ET had in mind the guidance laid down in cases such as **Wardle**, **Vento v Chief Constable of West Yorkshire Police (No. 2)** [2003] ICR 318, and **Ministry of Defence v Cannock** [1994] ICR 918, is clear; not only from the language used, but also because it expressly carried out its assessment on the basis of what was *likely*, rather than on the balance of probabilities. Contrary to the suggestion made in the Respondent’s submissions under the first ground of appeal, this is not a case where it can properly be questioned whether the ET had the correct legal principles in mind when it approached its task.

75. In reaching its decision on this point, the ET was faced with a dispute between the parties’ experts, not as to the diagnosis (on which they were agreed) but as to the prognosis. As Mr Tolley QC acknowledged in his oral submissions, the ET had been entitled to resolve this dispute – as it did – in favour of the expert evidence adduced by the Claimant. Given the ET’s finding on this

A point, therefore, the Claimant was to be treated as someone who would suffer from moderate
PTSD, depression and symptoms of paranoia for the rest of his working life and who would
B present with various functional impairments as a result, including finding it difficult to leave his
house on some days, or to attend to his personal care, or interact with members of the public, as
well as experiencing low mood and sleep disturbance. It was on that basis that the ET had to
determine whether there was any likelihood of the Claimant obtaining equivalent employment at
some point prior to his expected retirement age.

C 76. As the Respondent points out, neither expert entirely ruled out the possibility of the Claimant
re-entering the labour market at some stage. For Dr Sahota, however, that was because he took
D the view that the Claimant's condition might improve at some future point; he otherwise declined
to opine on questions relating to the Claimant's potential employability as this was outside his
area of expertise. Other than ruling out a return to the prison service, Dr Oyeboode also deferred
to the expertise of an occupational health assessor. Whilst he offered some opinion as to the
E Claimant's possible employability in his oral evidence ("*[employers] don't employ someone
going off every other week*"), he was plainly doing no more than making an obvious observation
as to the Claimant's vulnerability on the labour market; he was not purporting to provide expert
F occupational health assessment evidence. Although the ET did not, therefore, have the benefit
of expert evidence on the question it had to determine (the likelihood of the Claimant's being
able to obtain equivalent employment given the permanency (as the ET had found) of his mental
G health difficulties), that was not fatal to its ability to carry out the necessary assessment. Indeed,
even if it had had the benefit of an occupational health report, the ET would not have been obliged
to accept that evidence; the assessment required would always have been a matter for the ET.
Moreover, as Mr Tolley QC also acknowledged in oral argument, in carrying out that assessment,
H this specialist tribunal was entitled to have regard to its own experience of the labour market; as

such, it could be taken to be aware both of the legal obligations imposed on putative future employers under the **Equality Act 2010** and of the reality of the Claimant's still being "*very substantially disadvantaged in the labour market ... after what would be a very lengthy absence from work with significant mental health issues*" (ET Remedy Judgment, paragraph 29).

77. Given the ET's permissible acceptance of Dr Oyeboode's evidence as to the permanency of the Claimant's mental health impairments, it cannot be said that its conclusion – having correctly applied the test of likelihood, rather than that of the balance of probabilities – was perverse. This was "*a rare case*" (per **Wardle**, paragraph 50) where it was appropriate for the ET to assess compensation over a career lifetime.

78. That, however, is not the end of the challenge posed by the first two grounds of appeal. Even if it is allowed that the ET was entitled to treat this as a career-loss case, the Respondent contends that it then erred in its approach to the assessment of compensation on that basis; in particular, in failing to apply an appropriate discount to take account of the necessarily speculative exercise in which it was engaged. The Respondent's argument in this regard is essentially put on two bases. First, as was recognised in **Wardle** (albeit, *obiter*), even in a career-loss case, if an ET has found that there is *some* likelihood of the employee obtaining other work at some stage, that should be recognised by a sliding scale of discounts applied to sequential future slices of time, to reflect the progressive increase in likelihood of that employee securing an equivalent job. Second, the ET was required to reduce any award for future loss of earnings to reflect the vicissitudes of life, which was not done by merely using the 95% average retention figure within the prison service (for those with over five years service).

79. In **Wardle**, the ET had made a finding that there was a 70% likelihood that the Claimant would obtain an equivalent job within three years. If considering this as a career-loss case, the ET would need to reduce the compensatory award to reflect this finding but that was not achieved by merely applying a 70% reduction after three years: as both the EAT and the Court of Appeal observed, if Mr Wardle had a 70% chance of obtaining equivalent employment after three years, that likelihood must be all the greater over the years that would then follow. It was on that basis that Elias LJ agreed that a more nuanced approach would be required, applying a sliding scale of discounts to sequential future slices of time, to reflect the progressive increase in likelihood of Mr Wardle's mitigating his loss as the years went on.

80. The scenario thus envisaged in **Wardle** is not, however, replicated in this case: in this instance, the ET made no finding that the Claimant would be likely to obtain equivalent employment over any period of time. There may, of course, be cases where an ET has found that the employee has suffered a whole career loss and is unlikely to ever obtain equivalent employment, but where it is, nonetheless, appropriate to apply a sliding scale of discounts reflecting a progressive increase in likelihood that they will ultimately be able to obtain some very different employment, quite possibly at a very reduced level of earnings. Had the ET in the present case failed to consider this, I can see that there might be something in the Respondent's criticism. It is, however, plain that the ET did not omit to countenance this possibility. Rather, it considered whether the Claimant might be able to return to "*any work in the future*" but found that was "*extremely remote*" and would require him to undergo lengthy "*retraining and/or rehabilitation*", and that he would then still be "*very substantially disadvantaged in the labour market*" (ET Remedy Judgment, paragraph 29). Having reached that view, the ET was entitled to see this as a case where the evidence did not support the application of a sliding scale of discounts, because "*based on the evidence we have heard, it is very unlikely that the claimant*

A *will be able to return to work at any stage between now and his retirement age*” (ET Remedy Judgment, paragraph 34). On that basis, the ET concluded that the “*remote prospect of recovery and a return to work*” (Remedy Judgment, paragraph 35) could appropriately be reflected in the overall discount to be applied in this case. That was a permissible conclusion on the evidence and given the ET’s findings in this case. The Respondent’s challenge in this respect is, in reality, an attempt to persuade me to substitute what might be my own assessment for that of the ET; that does not give rise to a proper basis of appeal.

C

D 81. The final argument raised in this regard relates, however, to the 5% discount that the ET did apply in this case, which the ET used to take account of both the “*very slight prospect of the claimant retiring from the Service before his pension age*” as well as the “*equally remote prospect*” of his returning to work (ET Remedy Judgment, paragraph 35).

E 82. As I have already explained, given its findings in this case, I see nothing wrong with the ET’s approach to the discount to be applied for any future possible return to employment. Equally, I am clear that the ET was entitled to find that the prospect of the Claimant voluntarily leaving his work as a prison officer was “*highly unlikely*”. That was a finding supported by the evidence not only as to retention figures within the prison service generally but, more particularly, by everything the ET heard about the Claimant himself.

F

G 83. What the ET’s reasoning does not reveal, however, is a more general consideration of the uncertainties involved in its predicted loss of earnings in the Claimant’s case. There is nothing to suggest that the ET allowed for the more general vicissitudes of life: the possibility, that all of us must accept, of a working life cut short by reason of early death, disability or other unforeseen circumstance. Indeed, the ET’s reasoning fails even to allow for any uncertainty as to the

H

A Claimant's continued commitment to long working hours. Although a point discussed in relation
to the third and fourth grounds of appeal, the assumption that the Claimant would continue to
work broadly the same levels of overtime (and thus receive payment plus) would allow for no
B likelihood that an employee (working in a promoted grade) might not always seek to work such
long hours as they had done at an earlier stage in their career.

C 84. In my judgement, the ET's error in applying only a 5% discount does not arise in relation to
those matters to which it did have regard (the likelihood of the Claimant choosing to leave his
employment early or the possibility of his being able to return to some form of employment in
the future), but in its failure to take account of the more general uncertainties of life that might
D impact upon either the length of a person's working life or even just the length of their working
day. On this limited basis, therefore, I therefore allow the Respondent's appeal on the first and
second grounds.

E 85. I can take the third and fourth grounds of appeal more shortly. First, it is clear that the ET
did not make its finding on base salary on the basis of any alleged wrongful denial of payment
plus; as the ET stated: "*that was not pursued as a separate head of loss in these proceedings*"
F and that was plainly not an argument that it was prepared to entertain (ET Remedy Judgment,
paragraph 11).

G 86. As for the ET's rejection of the Respondent's argument, that it should use the year 2015/2016
as the basis for calculating the Claimant's base salary, that was because it found that adopting
such an approach would not properly reflect the Claimant's loss. As the Claimant had been
H largely unable to earn payment plus for that year, because of injury or his suspension, that was
plainly a finding the ET was entitled to make.

87. In then attempting to find a fairer means of representing the Claimant's actual loss, the ET chose to take the average for the two years contended for by the parties. Another ET might have chosen to take an average figure from a longer period or for different years. It cannot be said, however, that the method chosen by this ET was either wrong in principle or perverse. As for the ET's decision to take the figures from the Shared Services letter (recording the Claimant's total non-taxable pay for the relevant years) for both years, this was again a permissible option; the ET was entitled to take a robust approach to this evidence and was not bound to look behind the figures provided to the Claimant by Shared Services. Save that the ET ought not to have included payment plus in the figures used for pension loss (as to which there is no dispute between the parties and which can be corrected in the calculation of final sums that is still to be undertaken), no error of law arises and the appeal on grounds three and four is duly dismissed.

88. The fifth ground of appeal relates to the ET's finding that a 20% uplift should be applied pursuant to section 207A TULRCA. The point raised is one that has been the subject of consideration by different compositions of the EAT in Acetrip Ltd v Dogra, unreported, EAT (18 March 2019), UKEAT/0238/18 and Banerjee v Royal Bank of Canada [2021] ICR 359, albeit neither of those decisions would have been available to the parties in this case at the time of the remedy hearing (Judgment in Banerjee was only handed down on 30 October 2020 and I understand that the transcript in Acetrip was not available until sometime after the Remedy Judgment was promulgated in the present proceedings). In both those cases, the EAT held that, at least in cases involving larger sums, it would be an error of law for an ET to award a percentage uplift without first having an understanding of the actual amount involved. In Banerjee, Lord Summers spoke of the need for the ET to "*hear evidence about quantum before fixing the appropriate percentage*" (Banerjee, paragraph 6). In Acetrip, HHJ Auerbach held that it would

A be an error for the ET “*not to consider the absolute financial value or impact*” before determining the uplift to be applied (**Acetrip**, paragraph 102).

B 89. In the present case, the ET plainly had evidence before it that would have given a clear indication of the likely level of award in issue; I do not think it lost sight of the fact that the 20% uplift would be applied to an award that was likely to be over £2 million. What is not apparent, however, is whether the ET then had regard to the totality of the award it would be making once C the 20% uplift was applied. Whilst it was careful to consider the overall total of the sums awarded under other headings (for example, in relation to the awards for aggravated and exemplary damages), there is no indication that the ET undertook this assessment when determining the D percentage uplift for the purposes of section 207A **TULRCA**.

E 90. Although there may be a compensatory element to the uplift (by analogy with the statutory regime under consideration in **Wardle**, a failure to use the procedures under the **Acas Code of Practice** may deprive the employee of the opportunity to persuade the employer that dismissal would be inappropriate or unfair), inevitably there is a punitive quality to such an award. The F statute might not provide that the uplift is to be expressed in a precise amount but it does require that the ET considers that it is “*just and equitable*” to increase any award by that amount. It would be neither just nor equitable if, having regard to the actual sums involved, the final figure awarded by way of uplift was entirely disproportionate in terms of both the employee’s loss and G the employer’s breach.

H 91. In many cases, the figures involved will no doubt be straightforward and relatively modest; the sum to be awarded by way of any percentage uplift will be readily apparent and it will be obvious that the ET will have had this in mind when making such an award. Where larger sums

A are involved, however, a more structured approach will be necessary and should allow for a final
check, having regard to the principle of totality, so as to ensure the ET can be satisfied that the
final sum is proportionate and that it is just and equitable that the award should be increased by
B the amount of the uplift. The ET should, therefore, first work out the amount of the award to
which the uplift is to be applied. Having done so, it should determine what level of uplift might
be appropriate, given the ET's assessment of the employer's culpability and of any harm done to
the employee. Having thus reached a preliminary view as to the relevant starting point, the ET
C should then consider what that would actually mean in monetary terms. At this stage, the ET will
need to consider both the totality of the award it would be making, if the proposed uplift was
applied, and the proportionality of the uplift itself. At that stage, it may need to adjust the
D percentage to be applied in the light of the actual sums involved.

E 92. In the present case, I cannot be confident that the ET undertook the assessment thus required,
and I therefore uphold this ground of appeal.

F 93. In oral argument, the Respondent has sought to go further and to argue that any percentage
uplift greater than around 2% would be wrong in this case. That is effectively an argument that
the award made was perverse; a point of challenge not raised under the fifth ground of appeal. In
the circumstances, I do not consider it appropriate for me to express any view as to the appropriate
level of the uplift; that must be a matter for the ET to determine, having correctly undertaken the
G stepped approach required.

The Costs Appeal and the Respondent's Submissions

H 94. The appeal against the ET's Costs Judgment was permitted to proceed on a single ground, as
to whether the ET's order of 12 June 2019, awarding the Claimant a third of his costs of the

A proceedings, expressly excluding matters covered by the previous costs order of 18 May 2018,
offended against the principle of *res judicata*. It is the Respondent's case that the ET incorrectly
awarded further costs to the Claimant in circumstances where, in an earlier ruling, it had already
B awarded costs based on the same or similar matters.

95. The Respondent's submissions in support of this appeal can be summarised as follows:

C (1) The principles of *res judicata* (as analysed by Lord Sumption JSC in Virgin Atlantic Airways v Zodiac Seats UK Ltd [2013] UKSC 46), and their application to proceedings
before the ET, were not in dispute. As for the application of *res judicata* to costs, any
costs regime in a court or tribunal should also seek finality in litigation and to avoid double
D jeopardy (see (by analogy) Ultraframe (UK) Ltd and ors v Fielding and ors [2006] EWCA Civ 1660, [2007] 2 All ER 983, at paragraph 34, and Carroll v Kynaston [2011] QB 959, CA at paragraphs 30-31).

E (2) In the present case, the application that had led to the ET's first ruling on costs had been put by the Claimant on a wide-ranging consideration of the disclosure process in the proceedings to that date (16 May 2018). When then making the first award of costs, the ET had adjudicated upon the Claimant's allegations of unreasonable conduct and
F determined that, whilst these did not mean that the Respondent's response should be struck out, it was appropriate to make an award of costs against the Respondent.

(3) The ET then had to decide what costs had been incurred as a result of the Respondent's
G unreasonable conduct; doing so, it determined that four days had been lost.

(4) Whilst it was then open to the Claimant to make a subsequent application for costs, he
H could only do so to the extent that he was relying on a different subject matter as the basis for that application; the Respondent could not face double jeopardy for the same conduct.

A (5) To the extent that the later application for costs related to the Respondent's unreasonable
conduct, the ET had already determined that, up to 18 May 2018, the Claimant could be
compensated by the award of four days of costs. It was not open to the ET to re-open that
B assessment at a later stage.

96. Allowing that the ET might have taken a different approach to the application for costs made
at the end of the proceedings had it considered these matters properly, the Respondent
C nevertheless submitted that the proper outcome would be to uphold the award of one-third
costs but limited to the period *after* 18 May 2018.

D **The Costs Appeal: the Claimant's Response**

97. For the Claimant, Ms Braganza emphasised that the application made in May 2018 was for
the Respondent's response to be struck out, alternatively for the Respondent to be debarred from
defending the claim; the Claimant had made clear that, although he intended to make an
E application for costs, he would only seek his costs at the end of the proceedings. As for the effect
of the ET's first ruling on costs, the Claimant submitted as follows:

F (1) That first Judgment on costs had determined only part of a claim as regards costs (see the
definition of 'judgment' for these purposes, as provided by rule 1(3)(b) Schedule 1
Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013).

G (2) The agreed note of that first Judgment on costs made clear the basis on which the ET
awarded costs of four days: that is, because of the Respondent's conduct of, and during,
the hearing in May 2018 had added to the length of that hearing by four days.

H (3) In adjudicating upon the Claimant's subsequent application for costs, the ET specifically
addressed the point that the Respondent now relies on, and expressly distinguished its
previous costs award of 18 May 2018 from its award of 12 June 2019.

98. When making its second costs award, the ET had not erred in its approach and had not re-opened or re-interpreted its earlier costs ruling. The Costs Judgment was founded upon the conclusions reached (as it had explained in its Liability Judgment) as to the Respondent's unreasonable conduct over the entirety of the proceedings; the earlier ruling had related only to the four days that had been the subject of the first costs award, which were expressly excluded from the second award.

Costs Appeal – Relevant Legal Principles

99. *Res judicata* is, as Lord Sumption JSC put it in **Virgin Atlantic Airways v Zodiac Seats UK Ltd** [2013] UKSC 46, [2014] AC 160, see paragraph 17, a “*portmanteau term*”, used to describe a number of different legal principles with different juridical origins. Whether, however, used to describe a cause of action estoppel, an issue estoppel, or to refer to the principle laid down in **Henderson v Henderson** (1843) 3 Hare 100 (all of which are relied upon by the Respondent in the present appeal), the underlying purpose of each of the concepts to which this term can refer is to limit abusive and duplicative litigation (see per Lord Sumption at paragraph 25).

100. The principles of *res judicata* apply to a judgment or decision issued by an ET under rule 61 of Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**; which will include a determination by the ET of part of a claim as regards costs (see rule 1(3)(b)). The effect of this is that the administrative act of the issue of the ET's Judgment will generally serve to prevent any subsequent claim that is founded on the same, or substantially the same, complaint being brought before the ET or other court or tribunal on the basis of the doctrine of *res judicata* (see **Barber v Staffordshire County Council** [1996] IRLR 209, CA, at paragraphs 28-33). To the extent, however, that the Respondent seeks to rely on the Claimant's strike out application as demonstrating that his intention was to also put the question

A of costs in issue at that time, I bear in mind the need to proceed with caution, noting the express
reservation of his right to apply for costs at the end of the proceedings (and see, by analogy, **Sajid**
B **v Sussex Muslim Society** [2001] EWCA Civ 1684, [2002] IRLR 113, and **Srivatsa v Secretary**
of State for Health and another [2018] EWCA Civ 936, [2018] ICR 1660). More generally, it
is important to look to the substance of what a party has conceded by adopting or accepting a
particular course of action in litigation; as Mummery LJ observed when considering the extent of
a concession in **Sajid**:

C
"by a neat, technical swipe the [Defendants] would have eliminated a substantial
claim without any tribunal or court having heard any evidence or argument about
it. That seems to be a decision to which this court is not driven by any principle of
cause of action estoppel."

D 101. More specifically, when considering the application of *res judicata* principles to awards
of costs, it is helpful to keep in mind the underlying purpose, which is to prevent duplication and
abuse. Thus, the need to avoid duplicative litigation applies to a determination as to costs as to
any other matter in issue in legal proceedings. As explained by Ward LJ in **Carroll v Kynaston**
E [2010] EWCA Civ 1404, [2011] QB 959, upholding the lower court's refusal to open up the
question of costs when there had been an earlier order (made by Field J) expressly stating there
was "*no order as to costs*";:

F
"31. ... There must be finality in litigation. Making no order as to costs is an
adjudication on the point and the court should not be required to have a second
determination of the same issue. ... The claimant's true remedy was to appeal the
order actually drawn by Field J. He did not do so. He cannot now do so. He cannot
now get by the backdoor what he failed to secure by opening the front door...."

G 102. As the Respondent submits, the application of the *res judicata* principles should further
ensure that a party does not face double jeopardy in costs. In **Ultraframe (UK) Ltd and ors v**
Fielding and ors [2006] EWCA Civ 1660, [2007] 2 All ER 983, the issue arose when considering
H the potential relevance of the court's findings as to the dishonesty of the receiving party at both

A the stage when the initial order for costs was made and then at the assessment of those costs; as
Waller LJ observed:

B “34. ... consideration of a party’s conduct should normally take place both at the
stage when the judge is considering what order for costs he should make, and then
during assessment. But the court will want to ensure that dishonesty is penalised
but that the party is not placed in double jeopardy. ...”

The Costs Appeal – Discussion and Conclusions

C 103. In making his strike out application on 16 May 2018, although the Claimant stated that
he was seeking an order for costs against the Respondent, he expressly reserved any costs
application to the conclusion of the hearing. Declining to strike out the Respondent’s response,
the ET nevertheless went on to make an award of costs in the Claimant’s favour. It did so on the
D basis of what it found to be the Respondent’s unreasonable conduct at the hearing, specifically
referring to issues that had arisen regarding disclosure and witness availability. Having
determined that its costs jurisdiction was thus engaged, and that it was appropriate to make a
costs award in respect of that conduct, the ET’s assessment was that this had resulted in the
E Claimant having incurred additional costs for four days. The ET’s first award of costs against
the Respondent was, therefore, for the costs of the fifth-eighth days of the hearing.

F 104. Returning to the question of costs after the promulgation of its Liability Judgment, the ET
made a second order in the Claimant’s favour, this time for one-third of his costs of the entire
proceedings save for the four days that had already been the subject of the first award. In rejecting
G the Respondent’s argument that this offended against the principles of *res judicata*, the ET
explained that the first costs award had been made “*because the respondent’s conduct had been
disruptive and unreasonable regarding the piecemeal disclosure of documents and issues
regarding witness availability during the hearing*”, which had led to the “*loss of the 4 days of the
H hearing*”.

A 105. The difficulty with that explanation is that it makes good the Respondent's objection. In
making the first award, the ET had determined that its costs jurisdiction was engaged by the
B Respondent's unreasonable conduct in relation to disclosure and witness availability up to that
date. It had then assessed the additional costs that had arisen from that unreasonable conduct as
being the four days of costs arising from the need to extend the hearing as a result. Up to 18 May
2018, therefore, the ET's assessment was that the Respondent's unreasonable conduct of the
C hearing (in terms of disclosure and witness availability) had led to four days of additional costs,
for which the Claimant should be compensated. Having made that determination, it was not open
to the ET to re-visit the question of costs arising from the Respondent's unreasonable conduct in
terms of disclosure and witness availability up to 18 May 2018. That, however, is the effect of
D the ET's subsequent ruling, when it made the second costs award at the end of the proceedings.

E 106. In the ET's explanation of the second costs award, it again referred to the Respondent's
unreasonable conduct in relation to disclosure (see, for instance, paragraphs 19-21, Costs
Judgment). To the extent that the ET was referring to the Respondent's continuing unreasonable
conduct in this regard, post-dating 18 May 2018 (unfortunately the problems with disclosure did
not end on that date), no objection can be taken. Insofar as the ET's second award also referred
F back to the Respondent's conduct prior to 18 May 2018, however, it re-opened an issue it had
already determined, placing the Respondent at risk of double jeopardy with the same
unreasonable conduct up to that date being used as the basis of two separate costs orders.

G 107. That is not to say that the Claimant was entirely precluded from making any further
application for costs in respect of the Respondent's conduct of the proceedings prior to 18 May
H 2018. In pursuing his application in May 2019, the Claimant permissibly relied on matters
relating to the Respondent's conduct of the proceedings prior to the first costs award that were

entirely discrete from the issues of disclosure and witness availability that had informed that first award. Thus, for example, he had relied on the “*very late concessions made by the respondent*” (see paragraph 12.1, ET Costs Judgment); although the concession in respect of the statutory defence under section 109 **Equality Act 2010** had been made on the first morning of the hearing, the Claimant had not relied on that in support of his strike out application and it had not been taken into account by the ET in making the costs order in May 2018; this was a matter that went to the Respondent’s conduct of the proceedings prior to the first costs award but which had been the subject of no earlier costs determination.

108. Although the ET’s Costs Judgment does not expressly refer to such other matters as informing its second costs award, this was referenced in its Liability Judgment and the ET referred back to its earlier findings (paragraph 14, Costs Judgment), before descending into the problems of disclosure as “*but one example of how the claimant has been put to unnecessary extra work and costs due to the failings of the respondent*” (paragraph 21, Costs Judgment). Whilst, therefore, the ET erred in making an award of costs that re-visited an issue it had already determined, to the extent that the second costs award covered conduct prior to 18 May 2018, I do not infer that the ET only had in mind issues relating to disclosure and witness availability and it would be wrong to see the making of the first costs award as fatal to its ability to make a second award that related to other unreasonable conduct on the Respondent’s part, pre-dating the first award but forming no part of the ET’s first costs assessment.

109. Equally, the fact that the first costs award had arisen in circumstances in which the Claimant had put certain aspects of the Respondent’s unreasonable conduct in issue cannot mean that the Claimant was thereby precluded from making a subsequent application relying on different conduct that had also pre-dated the first costs ruling. The Claimant’s reliance on the

A Respondent's "*flagrant*" breaches of disclosure orders and obligations informed his application
to strike out the response; he thereby evinced no intention to deal with all aspects of the
Respondent's unreasonable conduct of the proceedings at that stage (indeed, he expressly
B reserved the wider issue of costs to the end of the hearing). Whilst the ET was entitled to see the
matters raised by the Claimant as warranting a costs award (declining to strike out the
Respondent's response), its ruling did not thus eliminate any subsequent consideration of costs
relating to other aspects of the Respondent's conduct of the proceedings at that time, and the
C Claimant's failure to expressly object to the course adopted by the ET (to the extent that it was
ever open to him to do so) did not remove his right to rely on such matters in any later application.
To suggest otherwise would be to entirely ignore the substance of that which was under
D consideration in the ET's first costs ruling and that is not a course required by the application of
res judicata principles in this case (and see, by analogy, Sajid v Sussex Muslim Society [2001]
EWCA Civ 1684, [2002] IRLR 113, and Srivatsa v Secretary of State for Health and another
E [2018] EWCA Civ 936, [2018] ICR 1660).

110. Although, therefore, I allow this appeal against the ET's Costs Judgment, I do not consider
it would be appropriate to simply restrict the second award to costs subsequent to 18 May 2018.
F That, in my judgement would fail to take any account of other aspects of the Respondent's
unreasonable conduct prior to that date, to which the ET was entitled to have regard when making
its later award. Moreover, as Mr Tolley QC fairly acknowledged in oral argument, it might fail
G to properly reflect the ET's intention given that its assessment of costs limited to one-third of
those incurred by the Claimant arose from its adoption of a broad-brush approach that
(erroneously) did not distinguish between pre-18 May 2018 costs relating to disclosure and
H witness availability and other costs relating to different aspects of the Respondent's unreasonable
conduct also pre-dating the first costs award. In the circumstances, in the absence of any

A agreement between the parties, the appropriate course must be to remit the question of costs back to the ET.

B **Disposal**

111. For the reasons provided above:

C (1) I allow the first appeal on Grounds 1 and 2, limited to the question of discount to take account of the future uncertainties of life as might impact upon the length of the Claimant's working life and/or the length of his working day as assessed over the period allowed for future losses. This is a question that will be remitted to the ET.

(2) I dismiss Grounds 3 and 4 of the first appeal.

D (3) I allow the first appeal on Ground 5, relating to the award made under section 207A TULRCA and the question whether it is just and equitable to make a 20% uplift once the totality of the sum thus awarded, bearing in mind the principle of proportionality, has been determined. This is also a question that will be remitted to the ET.

E (4) I further allow the second appeal. I direct that, absent any agreement between the parties, the issue of costs must be remitted to the ET.

F 112. The parties should file any written submissions they might wish to make on the remaining issues relating to disposal (in particular as to whether remission should be to the same or a different ET), to be received by the EAT at least 24 hours prior to the intended date for the formal handing-down of this Judgment. If the parties wish to make submissions on any other consequential matters, it would be helpful if these could be filed at the same time; failing which, the time-limits provided in the **EAT Practice Direction** will apply.

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